BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CAROLYN M. DAILY Claimant VS. **SIRLOIN STOCKADE** Respondent AND **KANSAS RESTAURANT & HOSPITALITY ASS'N SELF-INSURED FUND** Insurance Carrier	)	Docket Nos. 1,048,005 & 1,048,006

ORDER

STATEMENT OF THE CASE

Claimant requested review of the July 24, 2012, Award entered by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on December 4, 2012. William L. Phalen, of Pittsburg, Kansas, appeared for claimant. Dallas L. Rakestraw, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

In Docket No. 1,048,005, the Administrative Law Judge (ALJ) found claimant had a 5 percent impairment of function to the left upper extremity at the level of the shoulder as the result of a November 3, 2008 accident. In Docket No. 1,048,006, the ALJ found claimant had a 25 percent functional disability to the whole body. The ALJ found claimant failed to sustain her burden of proof that she was permanently and totally disabled as a result of the April 6, 2009, accident but found claimant was entitled to a 75.35 percent work disability based on a 100 percent wage loss and a 50.7 percent task loss.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant requests review of the ALJ's finding that she failed to prove she is permanently and totally disabled.

Respondent argues claimant is employable and is not permanently and totally disabled and asks that the Board affirm the ALJ's Award.

The issue for the Board's review is: Is claimant permanently and totally disabled?

FINDINGS OF FACT

This appeal pertains to two dates of accident. On October 22, 2009, claimant filed an application for hearing listing a date of accident of November 3, 2008, claiming she injured her "neck, left shoulder, arm, hand and all other parts of the body affected" while "[p]erforming the duties of a Cashier/Waitress."[1] This claim was enumerated Docket No. 1,048,005. Also on October 22, 2009, claimant filed an application for hearing listing a date of accident of April 6, 2009, claiming she injured her "neck, left shoulder, arm, hand and all other parts of the body affected" while "[p]erforming the duties of a Cashier/Waitress."[2] This claim was enumerated Docket No. 1,048,006.

Claimant started working for respondent in August 2008 as a cashier. Her job changed in late September 2008. She was still a cashier, but she was also doing some waitressing. Duties of a cashier were to greet customers, take their orders, make change, carry stacks of dishes, keep the front stocked with the dishes and silverware, sweep and mop floors and clean windows. Waitress duties including greeting each table, getting drinks, bussing tables, and bringing plates to the customers. Additional cleaning responsibilities of a waitress were to vacuum the carpeted areas and clean the bathrooms. Claimant was considered a part-time employee. On average, she worked 24 hours a week. Claimant's last day worked at respondent was April 27, 2009.

On November 3, 2008, claimant was pushing a mop bucket past the ice machine when a mop fell toward her. Claimant jerked to catch the falling mop, and when she did, a large metal ice scoop fell off the ice machine and hit her in the shoulder. That caused claimant to jerk backward. Claimant experienced immediate pain in her left shoulder and left side of her neck. She reported the accident to the assistant store manager. The accident happened about an hour before the end of her shift, and claimant continued to work until the end of her shift.

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[1] Form K-WC E-1, Application for Hearing filed October 22, 2009, in Docket No. 1,048,005.

[2] Form K-WC E-1, Application for Hearing filed October 22, 2009, in Docket No. 1,048,006.

Claimant initially saw Dr. Cummings on November 5, 2008, at respondent's request. On November 6, 2008, claimant was sent by Dr. Cummings to Coffeyville Regional Medical Center with complaints about her left shoulder. Claimant saw Dr. Cummings again later in November and twice in December 2008. She then requested another treating physician because Dr. Cummings "wasn't doing anything."[3] She was then referred to Dr. Kevin Mosier, who recommended physical therapy.

On April 6, 2009, claimant was reaching under a counter to move a stack of plates when she heard and felt three very distinct and painful pops in her neck and left shoulder. This accident occurred late in claimant's shift, and she was unable to complete her shift. Claimant reported her accident to Rick Shald, the store manager. She told Mr. Shald that she was in excruciating pain and needed to leave. Claimant had a previously scheduled physical therapy appointment on April 7, 2009, and she attended that appointment and reported her pain to the physical therapist.

Claimant was sent by respondent to Dr. Mosier, who took another x-ray and then scheduled her for shoulder surgery. Dr. Mosier performed an arthroscopic subacromial decompression on April 28, 2009. The surgery helped a little, but claimant was still having problems. Later, Dr. Mosier performed a manipulation on claimant's left shoulder while she was under anesthesia.

After a preliminary hearing, claimant was referred to Dr. Frank Tomecek, a neurosurgeon. He performed an anterior cervical diskectomy and fusion at C5-7 on May 25, 2010. There were complications, and the surgery did not make claimant better. Dr. Tomecek then performed a posterior arthrodesis at C5-6 on December 2, 2010. He sent claimant to physical therapy and referred her to Dr. Harris, a physiatrist, for pain management.

Claimant's last day of work for respondent was April 27, 2009, the day before her first surgery by Dr. Mosier. After Dr. Mosier performed surgery, he placed physical restrictions on claimant, which claimant took to respondent. Respondent did not offer her a job. When Dr. Tomecek released her from treatment, he gave her permanent restrictions, which she also took to respondent. Respondent did not offer her a job within those restrictions. Claimant has not worked since her last date working for respondent. She is currently taking Lortab and Baclofen, which have been prescribed by Dr. Harris. It is claimant's understanding she will be taking those medications permanently, although they make her lethargic.

Claimant still has constant pain with spasms in the left side of her neck and her shoulder. The pain radiates down the back of her arm and at times all the way to her thumb. The spasms radiate all the way almost to the top of her head. Claimant has started

[3] Claimant's Depo. at 30.

experiencing pain in her right arm, which she relates to over-compensating for her left arm. She is predominantly left-handed.

Claimant was in an automobile accident when she was a teenager, after which she experienced temporary left shoulder pain. In 1997, she tripped over a water meter and injured her right elbow. She had a slip-and-fall workplace injury on December 5, 2005, while working at Legends Senior Living. She injured her left arm and hip and had some physical therapy, primarily for her left hip. She had another slip-and-fall workplace accident at Legends Senior Living on August 20, 2007, but she could not remember any details about that accident.

Dr. Edward Prostic, a board certified orthopedic surgeon, evaluated claimant on two occasions, both at the request of claimant's attorney. He first saw claimant on December 21, 2009. Claimant gave Dr. Prostic a history of her injury of November 3, 2008, and the subsequent medical treatment. Claimant also gave the history of her April 6, 2009, injury and her treatment for that injury.

Claimant complained to Dr. Prostic of pain on the left side of her neck to the shoulder and up to the left temporal area, sometimes going toward her thumb. She had regained good motion of the left shoulder except for reaching behind her back. She had increased difficulties pushing, pulling, reaching and lifting. Dr. Prostic said claimant's complaints of pain were consistent with the mechanisms of injury. The results of Dr. Prostic's examination were also consistent with the mechanism of injuries given to him by claimant. Dr. Prostic diagnosed claimant with postoperative subacromial decompression and manipulation under anesthesia. She had evidence of degenerative disc disease of the cervical spine with radiculopathy as well as carpal tunnel syndrome. Dr. Prostic opined that his diagnoses were caused or contributed to by the work-related accidents of November 3, 2008, and April 6, 2009. He recommended claimant have consideration of epidural steroid injections and/or decompressive surgery. He recommended she minimize the use of her left hand at or above shoulder height and that she not lift or carry weights greater than 25 pounds occasionally or 10 pounds frequently.

Claimant was evaluated by Dr. Prostic a second time on April 19, 2011. Dr. Prostic noted that claimant had undergone an anterior cervical discectomy and fusion from C5 to C7 on May 25, 2010, performed by Dr. Tomecek. She later developed pseudoarthrosis and required posterior arthrodesis at C5-6 on December 2, 2010. Claimant had continued under Dr. Tomecek's care and, at the time of the examination, had a 10-pound lifting restriction. Claimant had not returned to work. Claimant continued to complain about her neck with intermittent numbness going to the left thumb, index and long fingers. She continued to have difficulty looking upward or turning her head to the right. Sometimes when she tilted forward, she got a painful catch in her neck. She was taking Baclofen and Lortab. Dr. Prostic opined that claimant's complaints of pain and the results of her physical examination were consistent with the mechanism of the injuries that occurred at respondent on November 3, 2008, and April 6, 2009.

Dr. Prostic diagnosed claimant with status post surgery to her neck and shoulder. He also found that claimant had evidence of carpal tunnel syndrome and residual symptoms from the neck and left upper extremity. Dr. Prostic opined that claimant had a 5 percent permanent partial impairment to her left upper extremity at the level of the shoulder as a result of the November 3, 2008, injury. He believed the November 3, 2008, accident caused a sprain and strain of claimant's shoulder.

As a result of the April 6, 2009, injury, Dr. Prostic said claimant suffered an aggravation of preexisting degenerative disc disease and cervical spinal stenosis. She had decompressive surgery for the rotator cuff and manipulation under anesthesia. He believed claimant had untreated carpal tunnel syndrome. He rated claimant as having a 20 percent impairment of the body as a whole for her cervical spine, a 15 percent impairment of the left upper extremity for her rotator cuff disease, and a 10 percent impairment of the left upper extremity for carpal tunnel syndrome.[4] He deducted the 5 percent preexisting impairment (from November 2008) from the April incident, leaving her with a 10 percent impairment to her left upper extremity at the shoulder level. His impairments combined for a 30 percent impairment to the whole body. All Dr. Prostic's ratings were based on the AMA *Guides*.[5]

Dr. Prostic opined that in the future, claimant should have carpal tunnel decompressive surgery. He also stated claimant would need continuing medicines for her pain syndrome and may need additional surgery to her cervical spine. Claimant would also need evaluation from time to time to monitor the status of her neck because cervical spinal stenosis typically is progressive.

Dr. Prostic reviewed the task list prepared by Karen Terrill. Of the 21 tasks on the list, Dr. Prostic believed claimant was unable to perform 12 for a 57 percent task loss. Dr. Prostic stated that unless claimant's condition can be improved, she is permanently and totally disabled from gainful employment. Dr. Prostic testified that if Karen Terrill had not offered an opinion that claimant was permanently, totally disabled, he might not have come to that conclusion. Dr. Prostic said Ms. Terrill has the benefit over him of knowing the general labor market and if Ms. Terrill believes claimant cannot find a job, Dr. Prostic had no basis for contradicting her.

Dr. Paul Stein, a board certified neurosurgeon, examined claimant on December 29, 2009, at respondent's request. He reviewed medical records, took a history, and performed a physical examination. Claimant was still under active medical treatment for the first accident when the second accident occurred. Dr. Stein asked claimant about preexisting shoulder and/or neck injuries. Claimant told him she had fallen and sustained a work-related injury to the left hip and hand, and that she had also been involved in a motor

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[4] Dr. Prostic did not have any results of an EMG study or any other test to confirm a diagnosis of carpal tunnel syndrome.

[5] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

vehicle accident as a teenager. Claimant did not recall any prior history of specific neck or left shoulder symptomatology.

After examining claimant, Dr. Stein requested the opportunity to review the images of her cervical MRI. He recommended claimant have pharmacologic pain management. He did not think further injections were indicated. He believed she should have medication for her discomfort. He also recommended a one-month trial of a TENS unit for pain reduction. Dr. Stein further provided claimant with permanent restrictions for her left shoulder and neck conditions: (1) avoid repetitive work activity with the left hand above shoulder level; (2) avoid activity with the left hand behind the plane of the body; (3) avoid activity with the left arm fully outstretched; and (4) avoid repetitive bending and twisting of the neck.

On February 5, 2010, Dr. Stein was able to review the MRI images. However, in his opinion the images were not of adequate technical quality to make a reasonable determination about nerve root impingement. He recommended another study be done, and additional MRIs were performed on March 5, 2010. From those images, Dr. Stein noted claimant had mild degenerative changes at C5-6. Dr. Stein saw no definite nerve root compression. There was mild disc bulging at C6-7. He had no treatment recommendations other than a trial of a TENS unit for reduction of pain. At that stage, he would not have recommended surgery.

On April 25, 2011, after claimant had undergone neck surgery, Dr. Stein re-evaluated claimant, again at respondent's request. After examining claimant, Dr. Stein rated claimant's functional impairment based on the AMA *Guides*. He rated claimant as having a 5 percent permanent partial impairment to the left upper extremity at the level of the shoulder for loss of range of motion. This would convert to a 3 percent impairment to the whole body. Because claimant was still symptomatic from her first accident when the second accident occurred, Dr. Stein could not apportion the impairment accurately between the two accidents. Regarding claimant's cervical spine, Dr. Stein placed claimant in DRE cervicothoracic Category IV and rated her impairment at 25 percent to the whole body. Combining the upper extremity impairment of 3 percent and the 25 percent impairment for the cervical spine gave claimant a combined 27 percent impairment to the whole body. Dr. Stein found no documentation of a preexisting impairment. When asked about permanent restrictions, Dr. Stein referred to his restrictions in his December 29, 2009, report, and added a restriction regarding sustained or repetitive overhead activity.

Dr. Stein reviewed the task list prepared by Steve Benjamin. Of the 27 non-duplicative tasks on the list, he believed claimant was unable to perform 12 for a 44.4 percent task loss. Dr. Stein acknowledged he was not an expert on job availability but believed if work was available within her restrictions and with her current status, including medications, claimant should be able to do it.

Karen Terrill, a vocational rehabilitation consultant, interviewed claimant by telephone on July 7, 2011, at the request of claimant's attorney. She prepared a list of 21 tasks claimant had performed in the 15-year period before her accidents at respondent.

Ms. Terrill obtained information about claimant's educational background. Claimant obtained a GED in 1976. From 1975 to 1976, claimant attended McLennan Community College in Waco, Texas, and obtained a certificate in general clerical studies. This would have been back when there were no office computers. Claimant obtained a certification in drafting at Coffeyville Community College, and she is only one hour short of an Associate's Degree in video communications and theater. Claimant can also interpret using Pidgin Sign Language. Pidgin Sign Language is more of a dialect sign language of the two prevailing types of sign language and is not commonly used. Claimant can type at 55 words per minute and has familiarity with email, internet, MS Word, PowerPoint and Excel.

Considering the totality of the circumstances in claimant's case, including her age, education, physical restrictions, ability to sit and stand, Ms. Terrill opined that claimant is unable to engage in any type of substantial, gainful employment.

Steve Benjamin, a vocational rehabilitation, met with claimant on January 9, 2012, at the request of respondent. He prepared a list of 27 nonduplicative tasks claimant performed in the 15-year period before her work-related accidents at respondent. Claimant told Mr. Benjamin that she had not been employed in the years 1993, 1994, 1995, 2002 and 2003. She did not say why she was unemployed during that period. In the 15-year period before claimant's accidents, she had not worked a full-time job.

Mr. Benjamin opined, after considering claimant's restrictions from Dr. Stein, past education, work history, training, transferable skills, age and geographic area, if she where to re-enter the open labor market, she most likely would earn an entry level wage. Mr. Benjamin believes there are jobs in the labor market that claimant can perform within her restrictions from Dr. Stein. He believed she could perform the jobs of an activity director, cashier, companion or home attendant, counter/rental clerk, hotel clerk or sales clerk.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[6] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[7]

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[8]

In *Wardlow,*[9] the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

The court in *Wardlow* looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

ANALYSIS

K.S.A. 44-510c(a)(2) creates a rebuttable presumption in favor of permanent total disability when a claimant experiences a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof. If the presumption is not rebutted, the

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[6] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[7] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[8] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[9] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.[10] The Kansas Court of Appeals has accepted the phrase "essentially and realistically unemployable" as a restatement of the statutory language in K.S.A. 44-510c(a)(2).[11]

It is significant to note that claimant worked only part-time. K.S.A. 2010 Supp. 44-511(a)(4) defines a part-time employee:

> The term "part-time hourly employee" shall mean and include any employee paid on an hourly basis: (A) Who by custom and practice or under the verbal or written employment contract in force at the time of the accident is employed to work, agrees to work, or is expected to work on a regular basis less than 40 hours per week;

In this case, the burden is on claimant to prove she is essentially and realistically incapable of finding part-time employment.

Karen Terrill, claimant's vocational expert, testified claimant is essentially and realistically unemployable as a result of her injuries. Ms. Terrill relied primarily on the restrictions placed upon the claimant by Dr. Tomecek. Dr. Tomecek's restrictions are found in a treatment update report written April 1, 2011. Dr. Tomecek did not testify. Dr. Tomecek's report containing the restrictions was not stipulated into the record.

ALJ Klein ordered an independent medical examination with Dr. Tomecek on March 12, 2010, with direction for Dr. Tomecek to treat the claimant if treatment was needed. On April 19, 2010, Dr. Tomecek prepared a comprehensive report that was filed with the Division on April 28, 2010. Pursuant to K.S.A. 2011 Supp. 44-516(a), the ALJ may request an examination and "[t]he report of any such health care provider shall be considered by the administrative law judge in making the final determination." The comprehensive report requested by and prepared for the ALJ is a part of the record. The report containing the restrictions placed on claimant by Dr. Tomecek was a follow-up report resulting from treatment provided to claimant and was not the report requested pursuant to K.S.A. 2011 Supp. 44-516(a).

The Board finds that only the initial report of the examination ordered by the ALJ may be considered as a part of the record without the requirement of additional foundation. Any other report made by Dr. Tomecek resulting from his treatment after the initial examination requires supporting testimony. Dr. Tomecek was never deposed and no stipulation was made by the parties allowing his treatment reports to be made part of the

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[10] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶ 8, 154 P.3d 494 (2007).

[11] See *Lyons v. IBP, Inc.*, 33 Kan. App. 2d 369, 378, 102 P.3d 1169 (2004); *Wardlow*, 19 Kan. App. 2d at 113.

record. Because Dr. Tomecek's restriction report is not in evidence, Ms. Terrill's opinions based upon Dr. Tomecek's restrictions can be given no weight.

Steve Benjamin, respondent's vocation expert, provided the opinion that claimant can obtain employment within Dr. Stein's restrictions. Dr. Stein's restrictions were entered into evidence and supported by the doctor's testimony. The Board agrees with the ALJ that Mr. Benjamin's opinions represent a more realistic assessment of claimant's ability to find employment.

CONCLUSION

Docket No. 1,048,005

While this docketed case was listed in the caption of the Application for Review filed by claimant, no issues were listed and no argument was made that the case should not be affirmed. The Board affirms the ALJ in all respects.

Docket No. 1,048,006

Based upon the foregoing, the Board finds that claimant failed to prove permanent total disability by a preponderance of the evidence. The Board finds that, based upon the evidence contained in the record, claimant is employable in some manner on a part-time basis and is not permanently and totally disabled.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated July 24, 2012, in both docketed cases is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2013.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

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Bruce E. Moore, Administrative Law Judge